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In The

Supreme Court of the United States

October Term, 1987

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR,

Appellants,

versus

DR. MARCIAL LEWIN

and

HILLCREST BAPTIST HOSPITAL,

Appellees.

On Appeal from the Supreme Court of the State of Texas

MOTION TO DISMISS

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MOTION TO DISMISS

—o—

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Appellee, Dr. Marcial Lewin, respectfully files this Motion to Dismiss the Appeal of Gary Elliott, who appears individually and as a next friend for Shauna Marie Elliott. This motion is brought in accordance with Rule 16 of the

United States Supreme Court Rules 28 U.S.C. § 16 (1984). The grounds for this Motion to Dismiss are the following:

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE THE APPEAL IS NOT WITHIN THIS COURT'S JURISDICTION

II. THIS APPEAL SHOULD BE DISMISSED BECAUSE THE JUDGMENTS OF THE STATE COURTS OF TEXAS REST ON AN ADEQUATE NON-FEDERAL BASIS.

III. THIS APPEAL SHOULD BE DISMISSED BECAUSE THE FEDERAL QUESTIONS ASSERTED BY APPELLANT WERE NOT EXPRESSLY PASSED UPON BY THE STATE COURTS OF TEXAS.

IV. THIS APPEAL SHOULD BE DISMISSED BECAUSE IT DOES NOT PRESENT FEDERAL QUESTIONS WHICH WERE PROPERLY RAISED IN THE STATE COURTS OF TEXAS.

———o———

STATEMENT OF FACTS AND HISTORY OF THE CASE

This case was filed in a Texas state district court as a medical malpractice case. Approximately one year after serving written discovery upon the Plaintiff, Gary Elliott, (hereinafter "Elliott" or "Appellant") and having received neither a response to the discovery request nor a motion to extend the time for answering, Dr. Marcial Lewin (hereinafter "Dr. Lewin" or "Appellee"), one

of the two defendants, filed a Motion for Sanctions under Rule 215 of the Texas Rules of Civil Procedure. Rule 215 is the Texas discovery sanction rule. After a hearing on Dr. Lewin's motion and a similar motion filed by the other defendant, Hillcrest Baptist Medical Center ("The Hospital"), the trial clerk dismissed the cause with prejudice based upon the history of discovery abuse in the case. Elliott's motion for a new trial was refused after a hearing on the matter. On appeal to the Court of Appeals for the Tenth Supreme Judicial District of Texas, the Court, following oral argument, affirmed the judgment of the trial judge because of the lack of an adequate appellate record for review. Elliott petitioned the Supreme Court of Texas for a Writ of Error and the writ was refused with a notation of "no reversible error". The subsequent Motion for Rehearing was overruled. Appellant now brings this appeal to the United States Supreme Court, alleging that a federal issue concerning the constitutionality of Rule 215 has been called in question and asserting that his due process and equal protection rights have been violated.

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RESTATEMENT AND ARGUMENT OF APPELLEE'S FIRST GROUND FOR HIS MOTION TO DISMISS

First Ground Restated:

THIS APPEAL SHOULD BE DISMISSED BECAUSE THE APPEAL IS NOT WITHIN THIS COURT'S JURISDICTION.

Appellant alleges that this Court has jurisdiction to hear this case pursuant to 28 U.S.C. Section 1257(2). This

section requires two jurisdictional predicates: 1) the appeal must call in question the validity of a state statute on the ground that the statute is repugnant to the United States Constitution or other treaties or laws of the United States; and 2) the state court from which the appeal is taken, must have directly ruled in favor of the statute's validity. Elliott can not approximate these requisites in this case. While the jurisdictional statement filed by the appellant purports to frame this case as a challenge both to the constitutionality of the Texas discovery sanction rule, Rule 215 of the Texas Rules of Civil Procedure, as well as to the application of Rule 215 in this case, these questions were not timely raised in the state courts of Texas, nor were they passed upon by the appellate courts in their decisions. In fact, the third issue raised—that the application in this case of Texas appellate procedural law was in violation of appellant's due process and equal protection rights—is raised for the very first time in the jurisdictional statement to this Court.

The issue of whether or not a federal question is properly raised in the trial court of a state is a question of state law. *North Carolina R. Co. v. Zachary, N.C.*, 232 U.S. 248, 34 S.Ct. 305, 58 L.Ed. 591 (1914). If state law is not followed, the Supreme Court is without power to decide whether constitutional rights have been violated. *Hulbert v. City of Chicago*, 202 U.S. 275, 26 S.Ct. 617, 50 L.Ed 1026 (1906). The very failure to present a federal question in conformity with the requisites of state procedure will constitute an adequate ground for the decision that will bar review from this Court, so long as the state has a legitimate interest in enforcing its procedural rules. *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978);

See also, Edelman v. California, 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387 (1953). The rule in Texas requiring proper presentation of a constitutional question to the trial court before the matter may be raised on appeal is rationally based upon the concept of fairness and comity between the court system. In this instance, the trial court was not advised in Elliott's Motion for New Trial of the attack upon the relevant Rule of Civil Procedure under which the sanction was issued; the constitutionality question regarding the statute itself was raised for the first time in the Court of Appeals. Both the Hospital and Dr. Lewin attacked the timeliness of the raising of these issues. The issue of the constitutionality of the application of sanctions in this case was not properly preserved for appeal in accordance with Texas law; additionally, as mentioned above, the issue regarding the application of Texas law regarding the need for an adequate appellate record is raised now for the first time.

In *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981), this court enunciated the rationale for requiring an appellant to follow proper appellate procedure in order for this Court to have jurisdiction to review the case: 1) principles of comity require that state courts have the opportunity to perform their duty of responding to attacks upon their own statutes; 2) there must be an opportunity to develop the appellate record necessary for adjudicating the constitutionality issue; 3) state courts must be afforded the opportunity to construe their own state statutes so as to avoid constitutional challenges, allowing for decision based on independent and adequate state grounds and pretermitting the federal issue; and 4) the state courts are allowed the opportunity to correctly

address the constitutional issues and dispose of the need for consideration by this Court. *Webb* at 451 U.S. 493,500-01, 68 L.Ed.2d 392,398-99. In the present situation, not only were the federal questions untimely and improperly raised on appeal, but there also is no ruling by the appellate courts on any of the constitutionality issues. Typically, if the highest state court fails to pass upon the federal question, this Court indulges in the presumption that the omission was due to the want of proper presentation in the state court. *Street v. New York,* 394 U.S. 576, 582, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

In the opinion issued by the Texas Court of Appeals it is abundantly clear that the decision of the court was predicated upon a state procedural basis—i.e., the appellant's failure to bring forward an adequate appellate record—and not upon a decision construing Rule 215 or its application by the trial court. There is no basis for jurisdiction in this case because the appellate rulings rested on a non-federal, state law basis, and there was no decision favoring the validity of Rule 215 under a properly raised federal question.

The federal questions were not properly raised in the state courts of Texas, the state courts did not rule upon the federal questions now asserted, and the state courts' decisions rest upon an adequate state ground; therefore, the appellant's jurisdictional allegations under 28 U.S.C. Section 1257 are unfounded and this Court is without jurisdiction to hear this appeal.

———o———

RESTATEMENT AND ARGUMENT OF APPELLEE'S SECOND GROUND FOR HIS MOTION TO DISMISS

Second Ground Restated:

THIS APPEAL SHOULD BE DISMISSED BECAUSE THE JUDGMENTS OF THE STATE COURT OF TEXAS REST ON AN ADEQUATE NON-FEDERAL BASIS.

The judgment of the Texas Court of Appeals was stated as follows:

> The court sanctioned the plaintiffs in this medical malpractice case by dismissing their suit with prejudice for an abuse of discovery. The question is whether the court abused its discretion in doing so. The judgment is affirmed because, without a statement of facts or findings of fact and conclusion of law, the court is conclusively presumed to have correctly exercised its discretion.

The standard for appellate review in this case was an "abuse of discretion" standard and Texas law concludes that without a proper appellate record, the courts must presume that the evidence supported the judgment. *The Englander Co. v. Kennedy,* 428 S.W.2d 806 (Tex. 1968). This presumption is necessary because, in the absence of a statement of facts containing all of the evidentiary support, appellate courts are unable to review all of the factors that the trial judge had before him when the decision was rendered. In such circumstances, all fact findings necessary to support the judgment of the court are implied on appeal. *Burnett v. Motyka,* 610 S.W.2d 735, 736 (Tex. 1980).

The Supreme Court does not review decisions that are based on adequate, nonfederal grounds. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977). This Court reviews state court decisions only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state courts. *New York, ex. rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61, 73 L.Ed 184 (1928). An inquiry into the propriety of the state court's decision will not be made unless it appears clearly that the state has improperly evaded the constitutional issue. *Demorest v. City Bank Farmers Trust*, 321 U.S. 36, 64 S.Ct. 384, 88 L.Ed. 526 (1944). In other words, the state court's ruling will be subject to scrutiny only if the record reveals that the reliance upon state law is a ruse and/or obvious subterfuge to evade consideration of the constitutional issue. *Radio Station WOW v. Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed 2092 (1945). Additionally, there must be fair and substantial support for the non-federal ground of the decision, *Staub v. Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958).

In the present case, clearly the basis for the Court of Appeals decision is an adequate, substantial, non-federal ground. Furthermore, relying upon that same basis of decision (that of the lack of a sufficient appellate record), the Court of Appeals noted that the constitutional issue *could not* be reviewed, and that the court must presume that the application of the sanctions was done in a constitutionally permissive way.

The adequate state law basis for the decision in this case was the sound principle of law that a re-

viewing court necessarily must have before it a record from which to examine the lower court's actions. Through the failure of the appellant himself the Texas appellate courts were denied a record of the evidentiary considerations that were available to the trial judge. Since there was no record on which to review the discretionary acts of the lower court on any basis, the Court of Appeals affirmed the judgment. Likewise, the Texas Supreme Court refused the petition for Writ of Error. Clearly, the judgment of the state court rested upon an adequate and independent state law basis, and this Appeal should be dismissed.

RESTATEMENT AND ARGUMENT OF APPELLEE'S THIRD GROUND FOR THE MOTION TO DISMISS

Third Ground Restated:

THIS APPEAL SHOULD BE DISMISSED BECAUSE THE FEDERAL QUESTIONS ASSERTED BY APPELLANT WERE NOT EXPRESSLY PASSED UPON BY THE STATE COURTS OF TEXAS.

The appeal of this case should be dismissed for the additional reason that the federal questions asserted by the appellant were not expressly passed upon by the state courts of Texas. In the written unpublished opinion, the Court of Appeals stated the following regarding the contention that the trial court acted unconstitutionally when it imposed sanctions:

> Without a statement of facts or findings of fact and conclusions of law, this court must presume that, under the circumstances, the trial court did not abuse its discretion and that it tailored the sanction to redress the prejudice to defendants.

The statements of the appellate court on this issue do not constitute an express finding either that Rule 215 of the Texas Rules of Civil Procedure is constitutional or that its application in this instance passed constitutional muster. Rather, the court recognized that it *could not* review the question because of a lack of proper appellate record. It is a fundamental prerequisite that the constitutionality question must be passed upon in the state courts; otherwise, the appeal is invalid. *Anonymous v. Baker,* 360 U.S. 287, 79 S.Ct. 1157, 3 L.Ed.2d 1234 (1959). Because the Texas courts did not pass upon the constitutionality of Rule 215, this appeal should be dismissed.

RESTATEMENT AND ARGUMENT OF APPELLEE'S FOURTH GROUND FOR HIS MOTION TO DISMISS

Fourth Ground Restated:

THIS APPEAL SHOULD BE DISMISSED BECAUSE IT DOES NOT PRESENT A FEDERAL QUESTION WHICH WAS PROPERLY RAISED IN THE STATE COURTS OF TEXAS.

In his Jurisdictional Statement filed with this Court, Elliott alleges three "constitutional questions" in this case. First is the question of whether Rule 215, as written, is contrary to the Fifth and Fourteenth Amendments to the United States Constitution. The second question is whether Rule 215, as applied in this case, violated Appellants constitutional rights and amounted to a denial of due process and equal protection under the law. Lastly, Elliott raised the inquiry of whether his due process and equal protection rights were violated because of the Court of Appeals' judgment that a review of the merits of the

case was impossible due to Elliott's own failure to provide the court with an adequate and complete appellate record.

Of the three constitutional issues Elliott seeks to bring for this Court's review, none of them were properly preserved for consideration for the Texas state courts. The issue of the application of Rule 215 by the trial court was raised briefly in the Motion for New Trial. The point of error regarding this issue was disposed of by the Court of Appeals on the basis that review was impossible because of the lack of appellate record. Furthermore, this particular point was not preserved for further review by an assigned point of error in the Motion for Rehearing in the Court of Appeals as required by Rule 100(a) of the Texas Rules of Appellate Procedure. As a result, the question of the constitutionality of the application of Rule 215 in this instance was not properly raised in the state courts since it was not preserved for rehearing to the Court of Appeals, nor was it preserved in the Petition for Writ of Error to the Supreme Court of Texas.

The question of the constitutionality of Rule 215 itself was raised for the first time in the appeal to the Court of Appeals. The trial court was never allowed the opportunity to rule on the issue. Moreover, in addition to being improperly raised, the question was not preserved for further appellate review in the Motion for Rehearing or the Petition for Writ of Error. The point of error was never properly raised in the state courts nor was it ruled upon at any point in the appeal.

Lastly, Elliott now raises with the Court, for the first time in the course of this litigation, the issue of the alleged

violation of his due process and equal protection rights by virtue of the appellate court's refusal to review the merits of the dismissal because of the failure of the appellant to provide a proper record. This point was not raised at all in the Motion for Rehearing in the Court of Appeals nor was it discussed in the petition for Writ of Error to the Supreme Court of Texas. A party may not raise a federal question for the first time in the appeal to this Court, *Moore v. Illinois,* 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972).

A federal question must be raised at the proper point in the appellate process, and specifically must be presented before the state courts for consideration. *Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). Additionally, the federal question must be presented in such a way that it was necessarily ruled upon by the state courts. *Bailey v. Anderson,* 326 U.S. 203, 66 S.Ct. 66, 90 L.Ed. 3 (1945). Because Elliott failed to properly raise the constitutional issues of which he now complains, this appeal should be dismissed.

———o———

CONCLUSION AND PRAYER

This appeal brought by Gary Elliott does not meet the jurisdictional requirements under 28 U.S.C. Section 1257(2), and for that reason alone, this appeal should be dismissed. Additionally, the federal questions that Elliott raises in his jurisdictional statement were not properly raised in the Texas state courts nor were they expressly passed upon in the judgments by those courts. Finally,

the judgment of the Texas Court of Appeals, review of which was refused by the Texas Supreme Court, rests on an adequate, substantial, non-federal basis. For all of the foregoing reasons, the appeal brought by Gary Elliott, individually and as next friend of Shauna Marie Elliott, should be dismissed.

WHEREFORE, Appellee Dr. Marcial Lewin respectfully requests that this Court, upon consideration of the jurisdictional statements and the motions filed in answer thereto, enter an order summarily dismissing this appeal on its merits.

Respectfully submitted,

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